In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 261

BERNARR FRANK HAYDEN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 343 F. 2d 459.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 1965 (Pet. 1). A petition for rehearing was denied on May 10, 1965. On June 9, 1965, Mr. Justice Brennan extended the time for filing a petition for a writ of certiorari to and including June 16, 1965, and a petition was filed on that date. The jurisdiction of this court is invoked under 28 U.S.C. 1254(1).

781-173—65

QUESTION PRESENTED

Whether the evidence showed the use of the United States mails and of interstate wire communications in furtherance of a scheme to defraud.

STATEMENT

After a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on two counts of using the mails to execute a fraud and two counts of using interstate communication wires to execute a fraud in violation of 18 U.S.C. 1341 and 18 U.S.C. 1343. He was sentenced to two years' imprisonment on each count, to be served concurrently. The court of appeals affirmed *per curiam*.

The evidence reveals that petitioner, a manufacturer of optic supplies, entered into a contract to sell his accounts receivable to Bradmore Investment Company, a factor (Tr. 53). In March and April 1963, petitioner told Bradmore that he was expecting a substantial order from Hughes Aircraft of Culver City (a well known firm in California) (Tr. 55). Bradmore indicated that it would purchase all of the accounts receivable charged to Hughes that petitioner could bring in (Tr. 55).

On May 22, 1963, petitioner registered at a local motel under a fictitious name, listing his employment as purchasing agent for Hughes Aircraft (Tr. 23, 196–200; Ex. 25, 38, 39). On May 23, 1963, he presented to Bradmore an invoice and shipping order made out to Hughes Aircraft, Optics Division, at a Los Angeles address (Tr. 15, 16, 79; Ex. 1). Brad-

more purchased the invoice for $5,359 (Tr. 20–22). On the same day, petitioner subscribed to an answering service in Los Angeles located at the address shown on the invoice sold to Bradmore as being that of Hughes Aircraft (Tr. 186–187).

Petitioner sold Bradmore two more fictitious invoices on May 27, 1963 ($10,472) (Tr. 17, 18, 79; Ex. 2), and May 29, 1963 ($9,979.20) (Tr. 18, 19, 79; Ex. 3). Petitioner offered a fourth invoice on May 31, 1963, but Bradmore did not accept it (Tr. 19, 20, 79; Ex. 4). On June 3, 1963, Bradmore sent a wire to Hughes Aircraft, Optics Division, at the Los Angeles address shown on the first invoice presented by petitioner (Tr. 26–29). This wire was received by petitioner's answering service and passed on to him (Tr. 190; Ex. 18, 37). Petitioner replied in a wire signed "Hughes Aircraft Company," stating that the Los Angeles office was on vacation and was being transferred to Great Falls, Montana (Tr. 28, 29; Ex. 9, 18). Petitioner had previously subscribed to an answering service in Great Falls in the name of Hughes Aircraft Company (Tr. 211–214, 258, 267; Ex. 40, 41, 42).

Shortly after Bradmore received petitioner's wire, petitioner went to its offices to inquire why it had rejected the invoice presented on May 31, 1963. Bradmore personnel expressed doubts as to the existence of the Hughes Aircraft Company shown on the invoices. Petitioner insisted that the company was in existence and showed them a fictitious purchase order from Hughes Aircraft for $50,000, which he

requested Bradmore to purchase (Tr. 35–37, 40–41, 58–59, 145; Ex. 11).

Petitioner then sent one of his employees to Montana with a package of 5,000 defective slides, which the employee, following petitioner's instructions, repackaged and shipped back to petitioner. This same employee ordered rejection slips printed under the letterhead of Hughes Aircraft and mailed a copy of the rejection slips,[1] covering all the invoices mentioned above, to petitioner and Bradmore on June 10 (Tr. 38, 39, 60; Ex. 12). These mailings formed the basis of counts one and two.

On June 20, 1963, petitioner admitted to Bradmore that Hughes Aircraft was not the same company as Hughes Aircraft of Culver City (Tr. 60), but assured Bradmore that Hughes Aircraft in Montana was a bona fide company which would honor its orders (Tr. 66–68, 108). Petitioner said that the first shipment of slides had been rejected for not meeting specifications, but that petitioner could rework them and thus make the entire invoice collectible (Tr. 66–68, 108).

On June 27, 1963, petitioner flew to Montana with his employee and placed two long distance calls to California during which he told Bradmore that Hughes would not wait for petitioner to rework the rejected slides. On petitioner's instructions, his employee posed as a Hughes purchasing agent and repeated the same story on the telephone (Tr. 68–72, 99–102).

[1] Petitioner sold his accounts receivable without recourse. However, the factoring contract called for petitioner's payment in the event of rejects.

These telephone calls are the basis of counts three and four.

ARGUMENT

Contrary to petitioner's argument, his use of the mails and of interstate wire was part of a scheme to defraud that was still being perpetrated at the time of their use. At least through June 20, petitioner was still attempting to obtain funds from Bradmore by representing that he had an order from Hughes Aircraft in Montana. The mailing of the rejection slips on June 10 was designed to give the impression that slides had actually been manufactured pursuant to the order from Hughes and that the order was in the process of being filled. The mailing was thus an integral part of an unfulfilled scheme. This case is thus different from *Kann* v. *United States,* 323 U.S. 88, and *Parr* v. *United States,* 363 U.S. 370, where the mailings were held to have occurred after the scheme to defraud had ended and to have been immaterial to its execution. The fact that petitioner did not succeed in his final attempt to obtain funds does not detract from the significance of the mailings to the plan. See *Kreuter* v. *United States,* 218 F. 2d 532 (C.A. 5); *United States* v. *Feldman,* 136 F. 2d 394 (C.A. 2), affirmed, 322 U.S. 487; *Norman* v. *United States,* 100 F. 2d 905 (C.A. 6), certiorari denied, 306 U.S. 660.

It is arguable that, by the time of the telephone calls of June 27, petitioner had given up any hope of getting any more money from Bradmore and was merely trying to keep Bradmore convinced that the

initial order was valid. However, as this Court stated in *United States* v. *Sampson*, 371 U.S. 75, 80, the mere fact that mailings took place after the victim had given up his funds does not mean that they were not for the purpose of executing a scheme to defraud. Such communications deliberately planned as a means of concealing the fraud or lulling the victims are within the purview of the fraud statutes. In any event, the mailing counts alone are sufficient to support the sentence. *Lawn* v. *United States*, 355 U.S. 339, 359.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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JULY 1965.

U.S. GOVERNMENT PRINTING OFFICE: 1965